No. 85-971

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether offices of national banks that offer only discount brokerage services are "branches" within the meaning of Section 7(f) of the McFadden Act, 12 U.S.C. 36(f).

2. Whether an association of securities brokers, underwriters, and investment bankers has standing to challenge the application of the McFadden Act's branching limitations to national banks.

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SECURITIES INDUSTRY ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 758 F.2d 739. The order and opinion of the court of appeals respecting denial of the suggestion for rehearing en banc (App., *infra*, 4a-9a) is reported at 765 F.2d 1196. The opinion of the district court (App., *infra*, 10a-29a) is reported at 577 F. Supp. 252.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 48a-49a) was entered on April 12, 1985. A petition for rehearing was denied on July 12, 1985 (App.,

infra, 4a-9a). On October 1, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 9, 1985. On November 1, 1985, the Chief Justice further extended the time for filing to and including December 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 36(c) provides:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on ~~State~~ banks.

12 U.S.C. 36(f) provides:

> The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. 81 provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

STATEMENT

1. Section 7(c) of the McFadden Act (the Act) (12 U.S.C. 36(c)) authorizes any national bank to establish branch offices in the state in which it is located. It may only do so, however, to the extent that "such establishment and operation are at the time authorized to State banks by the statute law of the State in question." 12 U.S.C. 36(c)(2). See generally *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 253 (1966).[1] By its terms, this geographical limitation applies only to the operation of national bank "branches," which are defined by Section 7(f) of the Act (12 U.S.C. 36(f)) "to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

b. In 1982, two national banks, Union Planters National Bank of Memphis (Union Planters) and Security Pacific National Bank of Los Angeles (Security Pacific), applied to the Comptroller of the Currency for permission to open offices that would

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[1] In addition, national banks may branch within their home city "if such establishment and operation [of branches] are at the time expressly authorized to State banks by the law of the State in question." 12 U.S.C. 36(c)(1).

offer discount brokerage services to the public.[2] Security Pacific's application stated that these services initially would be offered at Security Pacific's established branch offices throughout California, and eventually would be provided at nonbranch offices in California and other states. App., *infra*, 11a. Union Planters' application stated that it planned to acquire Brenner Steed & Associates, Inc. (Brenner Steed), an existing discount brokerage firm, and that it intended to offer Brenner Steed's services at selected Union Planters branches in Tennessee, as well as at locations in six other states. *Id.* at 10a-11a.

On August 26, 1982, the Comptroller approved Security Pacific's application, concluding that bank offices offering only discount brokerage services are not "branches" within the meaning of the Act, and therefore are not subject to the Act's geographical restrictions on the locations where national bank offices may operate.[3] The Comptroller first noted that the term "branch" is "statutorily defined to include" any place " 'at which deposits are received, or checks paid, or money lent.' " App., *infra*, 39a, quoting 12 U.S.C. 36(f). He then determined that Security Pacific's discount brokerage offices would not receive deposits, pay checks, or make loans (App., *infra*.,

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[2] Discount brokers execute trades on behalf of their customers but do not offer investment advice. As a result, the commissions they charge are substantially lower than those charged by full-service brokers. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2.

[3] The Comptroller also found that Security Pacific's provision of discount brokerage services was not barred by the Glass-Steagall Act (12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378). App., *infra*, 31a-39a.

39a-43a), and thus would not fall within the statutory definition.

Although this conclusion sufficed to establish that the operation of discount brokerage offices away from chartered branches would not run afoul of the Act, the Comptroller went on to address the question whether those offices nevertheless "could be found by a court to be branches within the meaning of the McFadden Act" under *any* reading of the statute (App., *infra*, 43a). He concluded that they could not. Even if the Act were read to provide that some bank offices that do not perform any of the three services enumerated in Section 36(f) are branches, the Comptroller explained, those services "should at the very least" involve "dealings with the public requiring a specialized banking or similar license" (App., *infra*, 43a-44a). Discount brokerage operations do not fall into this category. Indeed, the Comptroller explained that it would be inconsistent with settled practice in the banking industry to find that securities brokerage activities constitute a branch banking function, because a substantial "number of banks currently operat[e] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra-state and interstate basis." *Id.* at 45a.[4]

2. In response to the Comptroller's decisions, respondent, a trade association representing securities brokers, underwriters, and investment bankers (see App., *infra*, 10a), brought this action in United States District Court for the District of Columbia.

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[4] Shortly after issuing this opinion, the Comptroller approved without comment Union Planters' application to acquire Brenner Steed (App., *infra*, 47a).

Among other things,[5] respondent contended that bank discount brokerage offices are branches within the meaning of Section 36(f) and thus are subject to the geographical restrictions imposed by Section 36(c). Respondent therefore argued that discount brokerage services may be offered by national banks only at their central offices or at licensed branches.

In relevant part, the district court ruled for respondent. The court first held that respondent had standing to challenge the Comptroller's implementation of the Act. Although the court acknowledged that the Act was passed "to equalize competition between state and national banks" (App., *infra*, 20a), it nevertheless held that respondent's claim fell "within the zone of interests protected by the McFadden Act" (*id.* at 23a).[6] Relying on *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970) and *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), which had held that bank competitors may challenge the implementation of the Bank Service Corporation Act (12 U.S.C. 1861-1867), the district court reasoned that there is no need for "any explicit expression in the statute or its legislative history for the court to find that [respondent] is within the [Act's] zone of interests" (App., *infra*, 23a). And the court found that the Act, read in conjunction

[5] Respondent also contended that the Glass-Steagall Act *entirely* prohibits national banks from offering discount brokerage services (see note 3, *supra*). This contention was rejected by the district court (App., *infra*, 13a-20a).

[6] The court also found that respondent had demonstrated that it will suffer actual harm from the Comptroller's ruling because respondent "alleged that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them" (App., *infra*, 23a).

with the National Bank Act of 1864, "evince[d] the intent of Congress to curb the scope of national banks' activities" (App., *infra*, 24a). If national banks succeed in avoiding these curbs, the court held, respondent's members will be injured "just as" the bank competitors in *Arnold Tours* and *Data Processing Organizations* had been harmed.

On the merits, the district court—while acknowledging that the Comptroller's views are entitled to deference (App., *infra*, 25a)—rejected the Comptroller's argument that the Act's branching restrictions apply only to offices that perform at least one of the three activities enumerated in the statutory definition. The court noted that Representative McFadden, in post-enactment remarks, described the term "branch" to include a bank office that "transact[s] any business carried on at the main [bank] office" (*id.* at 26a, quoting 68 Cong. Rec. 5816 (1927) (emphasis omitted)). And the district court read this Court's holding in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), as requiring "a broader, more flexible interpretation * * * of the statute than that followed by the Comptroller" (App., *infra*, 26a). The district court therefore ruled that the "brokerage business * * * is within the category of 'general business' which national banks may conduct at their main office and, as such, is subject to the branching restrictions" (*id.* at 28a). The court accordingly invalidated the Comptroller's ruling to the extent that it permitted Union Planters and Security Pacific to offer discount brokerage services at nonbranch locations.

In a brief per curiam opinion, the court of appeals affirmed the district court's ruling, "generally for the reasons stated" by the district court (App., *infra*,

2a). Judge Scalia dissented from the McFadden Act aspect of this holding,[7] arguing that the district court had "conflate[d] the constitutional requirement of injury in fact and the separate requirement that 'Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute'" (App., *infra*, 3a, quoting *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984)). In Judge Scalia's view, only "state banks and possibly federal banks" are within that zone (App., *infra*, 3a). He therefore would have dismissed respondent's claims under the Act for lack of jurisdiction.

The Comptroller's petition for rehearing en banc[8] was denied (App., *infra*, 4a-5a) over a dissent by Judge Scalia, joined by Judges Bork and Starr. Judge Scalia repeated his criticism of the court's holding on standing, finding it "uncontroverted that [the Act's] purpose was to establish competitive equality between state and federal banks * * *. Thus, state banks (and state banking commissions) are obviously within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are busi-

[7] The court of appeals unanimously affirmed the district court's holding that the Glass-Steagall Act does not prohibit national banks from offering discount brokerage services, noting that the district court's ruling on this point was bolstered by *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984) (App., *infra*, 28a). The Glass-Steagall Act aspect of the holding below is challenged by respondent's pending petition for a writ of certiorari, No. 85-392.

[8] Security Pacific intervened and filed its own petition for rehearing en banc.

nesses competing for the parking spaces that an unlawful branch may occupy" (App., *infra*, 6a). In these circumstances, Judge Scalia reasoned that the court's ruling "entirely reduces the 'zone of interest' inquiry under the McFadden Act to an inquiry into 'injury in fact'" (*id.* at 6a-7a).

Judge Scalia also took issue with the court's holding on the merits. He noted that discount brokerage services are not one of the activities enumerated in Section 36(f). And he found this Court's ruling in *Plant City*, which described the Section 36(f) definition as "'suggest[ing] a calculated indefiniteness'" (App., *infra*, 8a, quoting 396 U.S. at 135 (emphasis omitted)), to be "virtually dispositive *in favor of the Comptroller*" (App., *infra*, 8a (emphasis in in original)), since such a definition "presents precisely the situation in which [the court's] deference to the agency should be at its height" (*ibid.*).

REASONS FOR GRANTING THE PETITION

Despite the brevity of its opinion—and its failure to offer any reasons in support of its ruling—the court of appeals' McFadden Act holding will have an immediate and substantial effect on the Nation's banking industry, as well as on competition in the offering of broker's services. In addition to the two involved in this case, the Comptroller currently is considering more than 60 applications from national banks for permission to engage in the discount brokerage business. Under the ruling below, the Comptroller will be required to deny these applicants permission to conduct discount brokerage operations away from licensed bank branches. Because discount brokers charge low commissions and depend for their profits on a high volume of business (cf. *Securities*

Industry Ass'n v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2; App., *infra*, 11a), the court of appeals' holding raises substantial practical barriers to the ability of national banks to compete with brokerage houses that are not subject to geographical limitations. And given the increasing competition in the financial services industry (see, *e.g.*, J. Hawke, *Commentaries on Banking Regulation* 245-279 (1985)), this development is of considerable significance to national banks.

The court of appeals' ruling also creates anomalous and disruptive distinctions *within* the banking industry. Under this Court's decision in *Securities Industry Ass'n* v. *Board of Governors*, *supra*, bank holding companies may offer discount brokerage services that are not subject to geographic restrictions.[9] But that ruling cannot benefit the smaller and medium-sized national banks that are not affiliated with holding companies—and which are thus doubly disadvantaged by the decision below.[10]

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[9] Brokerage businesses owned by holding companies may be operated on a nationwide basis: those businesses are not "banks" under the Bank Holding Company Act (see 12 U.S.C. 1841(c)), and thus are not subject to the limitations on interstate banking operations imposed by that Act. 12 U.S.C. 1842(c); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47-48 & n.13 (1980). See generally *Northeast Bancorp, Inc.* v. *Board of Governors*, No. 84-363 (Apr. 15, 1985), slip op. 2.

[10] Even bank holding companies that are permitted to operate discount brokerage businesses as nonbanking subsidiaries (rather than as wholly owned subsidiaries of a national bank) do so at a disadvantage; while bank subsidiaries may be funded with bank funds, holding company subsidiaries may not be funded in that manner. Thus Security Pacific, although owned by a holding company, in this case is seeking

The importance of the court of appeals' decision is compounded by what can be expected to be its nationwide effect. The Comptroller may always be sued in the District of Columbia. See 28 U.S.C. 1391(e). And given the precedent established by the decision below (as well as the vigilance of respondent in protecting its members' interests), it is unlikely that a conflict in the circuits ever will develop on the question presented here. Indeed, after this action was filed, respondent brought another suit in the United States District Court for the District of Columbia that challenges, among other things, the Comptroller's decision to permit a national bank to offer brokerage and investment advice services at nonbranch locations. *Securities Industry Ass'n* v. *Conover*, No. 83-3581 (D.D.C.).[11] In these circumstances, review of the decision below plainly is warranted.

1. a. Although the court of appeals' holding that discount brokerage services may be offered by national banks only at chartered branches will have a substantial and immediate effect on the banking industry, that ruling cannot be reconciled with the Act. Section 36(f) (emphasis added) specifically defines the term "branch * * * to include any branch bank, branch office, branch agency, additional office or any branch place of business * * * at which *deposits are received, or checks paid, or money lent.*" As the Comptroller explained in detail (App., *infra*, 39a-43a), discount brokerage offices perform none of these functions—and therefore cannot be deemed branches.

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permission to operate its brokerage business as a banking subsidiary.

[11] The district court has stayed proceedings in that case pending disposition of the certiorari petitions filed here.

Because the statute uses the word "include," the courts below evidently reasoned that the three enumerated functions that characterize a branch—receiving deposits, paying checks, and making loans—were intended by Congress only to be illustrative (see App., *infra*, 26a-27a). Given the structure of the statutory definition, however, the approach taken below plainly is a misreading of Section 36(f): "[t]he term 'include * * * does not relate to the activities involved but refers to the *places* at which the specified activities of receiving deposits, paying checks and lending money are carried out. The places may include branch banks, branch offices, branch agencies, additional offices, mobile trucks, [and] electronic devices." *Continental Illinois National Bank* v. *Illinois ex rel. Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976), slip op. 17-18 (emphasis added) (reprinted in Gov't C.A. Br. Addendum C). The statutory language thus should have been dispositive.

b. The courts below nevertheless reasoned that the Act's legislative history justified their refusal to apply a "literal reading of the statute" (App., *infra*, 25a). In fact, however, the legislative background, to the extent that it sheds any light at all on the issue here, supports the conclusion that bank offices are subject to the Act's branching restrictions only when they perform one of the three functions enumerated in Section 36(f). During debate on the Act, both proponents and opponents of branch banking expressed concern that national banks might obtain monopoly control over capital and credit, thus driving smaller state banks out of business. See, *e.g.*, 66 Cong. Rec. 1628-1629 (1925) (remarks of Rep. Stevenson); *id.* at 1633 (remarks of Rep. Williams); *id.* at 4437 (remarks of Sen. Reed). It is,

of course, through the receiving of deposits, cashing of checks, and making of loans that the money supply and credit are controlled; not surprisingly, then, the congressional discussion about the appropriate scope of restrictions on branching referred only to bank offices that performed these functions. See, *e.g.*, 66 Cong. Rec. 1628 (1925) (remarks of Rep. Stevenson); *id.* at 1633 (remarks of Rep. Williams); *id.* at 4433 (remarks of Sen. Shipstead); *id.* at 4527 (remarks of Sen. Heflin).[12]

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[12] The district court's analysis of the legislative history was limited to consideration of a single post-enactment statement by Rep. McFadden, to the effect that "'[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at its main office* is a branch * * *'" (App., *infra*, 26a, quoting 68 Cong. Rec. 5816 (1927) (remarks of Rep. McFadden) (emphasis added by the court)). But the district court's reliance on this statement —which was inserted into the record 10 days after passage of the Act, while Congress was in adjournment—disregarded this Court's "oft-repeated warning that [post-enactment statements] form a hazardous basis for inferring" the intent of Congress. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 823 (1980). And there are especially compelling reasons here to be skeptical of Representative McFadden's statement. While the branching statute bears his name, Representative McFadden was in fact a fervent opponent of branch banking, who would have required state banks to relinquish statewide branches and imposed significant limitations on branching by national banks. See 67 Cong. Rec. 2829, 2832 (1926) (remarks of Rep. McFadden). He thus had a clear interest in adding to the legislative record a broad definition of "branch." Indeed,

At the same time, the legislative background makes plain that the omission of brokerage operations from the functions enumerated in Section 36(f) could not have been an oversight. At the time of the Act's enactment in 1927, "[i]t [was] a matter of common knowledge that national banks [had] been engaged in the investment-securities business * * * for a number of years." H.R. Rep. 83, 69th Cong., 1st Sess. 2 (1926); see 66 Cong. Rec. 1585-1586 (1925) (remarks of Rep. McFadden). Congress also was aware that these securities activities were conducted "to a very large extent throughout the country." 67 Cong. Rec. 8351 (1926) (remarks of Sen. Pepper). Indeed, in the same legislative package in which it defined the term "branch," Congress specifically authorized national banks to buy and sell investment securities. See ch. 191, § 2, 44 Stat. 1226; S. Rep. 473, 69th Cong., 1st Sess. 7 (1926). Had Congress intended these activities to be carried out only at chartered branches, it presumably would have said so. Cf. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716, 721 (8th Cir. 1976) (Henley, J., dissenting), cert. denied, 433 U.S. 909 (1977).

c. The courts below also felt free to disregard the Comptroller's construction of Section 36(f) because they found it inconsistent with this Court's statement in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (see App., *infra*, 26a-27a) that

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Rep. McFadden's post-enactment remarks primarily demonstrate how easy it would have been for Congress to have adopted an all-encompassing definition of branch had it wished to do so.

> [a]lthough the definition [in Section 36(f)] may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term 'branch'; by use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135; emphasis in original. The Court in *Plant City* then held that two off-premises banking services owned and operated by a national bank—an armored car messenger service that received cash and checks for deposit and a stationary receptacle for customer deposits (see *id.* at 125-129)—were branches within the meaning of Section 36(f) because they "received * * * deposit[s]" (*id.* at 137).

On close examination, it is plain that the Comptroller's analysis here is entirely consistent with *Plant City*. To the extent that the language quoted above leaves open the possibility that branches may include bank offices that do not perform one of the three enumerated functions, the Court expressly declined to resolve the issue; its opinion was explicitly "confine[d] * * * to the question of whether deposits were received" at the challenged off-premises facilities (396 U.S. at 135). Indeed, if the Court had meant to hold that *all* bank offices are branches, its extensive consideration of the question whether the facilities at issue received deposits would have been unnecessary. See *id.* at 135-138.

Insofar as the *Plant City* dictum is relevant at all, then, it should be deemed "virtually dispositive in

favor of the Comptroller" (App., *infra*, 8a (Scalia, J., dissenting) (emphasis omitted)). As Judge Scalia noted, a statute "containing a 'calculated indefiniteness' presents precisely the situation in which [a court's] deference to the agency should be at its height" (*ibid.*). See generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5-7; *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 56 & n.21 (1981). And the "Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness—or indeed that the range includes *only* the enumerated functions—cannot by any means be considered unreasonable" (App., *infra*, 8a-9a (emphasis in original)).

The deference due the Comptroller is reinforced by the fact that the court of appeals' novel reading of the statute would disrupt long-settled practice in the banking industry. For many years, the Comptroller has permitted national banks to operate loan production offices, government and municipal securities offices, trust offices, and similar operations—which do not carry on any of the three functions enumerated in Section 36(f)—on an interstate basis, without regard to the Act's branching limitations. See App., *infra*, 44a. See generally 12 C.F.R. 7.7380; Whitehead, *Regional Forces for Interstate Banking*, Fed. Res. Bank of Atlanta Economic Review 4 (May 1983). The decisions below cannot be reconciled with this established practice. In these circumstances, "the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons' " of a sort that plainly have not been

advanced here. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978), quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921). Cf. *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 21-22.

d. Finally, even if the three functions enumerated in Section 36(f) are not the only ones that characterize branches, the courts below erred in holding that *all* operations undertaken by banks—including *non-banking* operations such as discount brokerage—must be conducted at branches. The three functions enumerated in Section 36(f), if not wholly dispositive, must have at least some bearing on the definition of the term "branch"; their inclusion in the statute otherwise would have been wholly superfluous.[13] And what those functions have in common, of course, is each one's status as a "basic bank[ing] service[]" (*Plant City*, 396 U.S. at 137). As a result, courts have characterized the test of a branch as whether the office at issue performs "routine bank-

[13] The district court thus erred in suggesting (App., *infra*, 28a) that 12 U.S.C. 81—which provides that "[t]he general business of each national banking association shall be transacted in [its main office] and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title"—confines all aspects of a bank's business to its main office or its branches. Such a reading renders Section 36(f) superfluous, and disregards Section 81's incorporation by reference of Section 36. In fact, Section 81 simply limits the places at which a bank may carry on its "general business," rather than the places at which it may conduct any of its business. See *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87-88 (1911) (the "cases clearly indicate * * * a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business").

ing function[s]" (*Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 178 (7th Cir.), cert. denied, 429 U.S. 871 (1976)) or "traditional banking transaction[s]." *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977). See also *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 943 (D.C. Cir.), cert. denied 429 U.S. 862 (1976). Against this background, as the Comptroller explained, even the broadest reading of Section 36(f) must "at the very least be limited to those dealings with the public requiring a specialized banking or similar license" (App., *infra*, 43a-44a).[14]

This distinction between basic bank services and the more peripheral activities that are performed by banks has been recognized in other contexts by Congress and the Court. In 12 U.S.C. (Supp. II) 24 Seventh, for example, Congress specifically defined the "business of banking" to include "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * * receiving deposits;

[14] Although several courts have used broad language in describing the definition of "branch," to our knowledge only one court has held that a bank office performing a function other than one of the three enumerated in Section 36(f) is a branch. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), cert. denied, 433 U.S. 909 (1977). In *St. Louis County National Bank*, a divided panel of the Eighth Circuit held that bank trust offices are subject to branching restrictions. While we believe that this decision was incorrect, it has an arguable basis in the fact that trust offices—unlike discount brokerage offices—do require the issuance of a special banking license from the Comptroller. See 12 U.S.C. 92a; 548 F.2d at 719-720.

* * * buying and selling exchange, coin, and bullion; * * * loaning money on personal security; and * * * obtaining, issuing, and circulating notes." The brokerage business is not included on this list of traditional bank activities. To the contrary, the next sentence of 12 U.S.C. (Supp II) 24 Seventh authorizes national banks to undertake, to a limited extent, the "business of dealing in securities and stock." Similarly, this Court has upheld the right of bank holding companies to acquire discount brokerage firms under the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*) because discount brokerage is a "*nonbanking* activity 'closely related to banking.'" *Securities Industry Ass'n* v. *Board of Governors*, slip op. 2, quoting 12 U.S.C. 1843(c)(8) (emphasis added). Cf. *Merchants' Bank* v. *State Bank*, 77 U.S. 604, 651 (1871); *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87-88 (1911).

There is thus little doubt that discount brokerage is not a traditional banking service. It could not seriously be suggested, for example, that Brenner Steed prior to its acquisition by Union Planters—or, for that matter, that respondent's members—engaged in the banking business by offering brokerage services. And the character of Brenner Steed's operations was not altered by the acquisition. In these circumstances, the Comptroller's careful distinction between traditional bank services and discount brokerage operations (App., *infra*, 43a-44a) should have been respected by the courts below.

2. The courts below also erred for a second, independent reason, in holding that respondent has standing to challenge the Comptroller's decision. While respondent may have suffered injury in fact (see App., *infra*, 23a), its claim plainly does not "fall within 'the zone of interests to be protected or regu-

lated by the statute * * * in question.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982), quoting *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). And as this Court repeatedly has explained, satisfaction of the zone of interests requirement is a prerequisite to standing.[15]

It is beyond dispute that the enactment of the Act "was a response to the competitive tensions inherent in a dual banking structure where state and national banks coexist in the same area," and was designed to guarantee "that neither system have advantages over the other in the use of branch banking." *Plant City*, 396 U.S. at 131. Prior to passage of the Act in 1927, national banks were prohibited from establishing branches. See *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966); *First National Bank* v. *Missouri*, 263 U.S. 640, 656 (1924). State banks, however, could branch as permitted by the laws of the individual states, a situation that placed national banks at a "considerable disadvantage." H.R. Rep. 83, 69th Cong., 1st Sess. 6 (1926). See *Walker Bank*, 385 U.S. at 257; 66 Cong.

[15] See *Allen* v. *Wright*, No. 81-757 (July 3, 1984); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

Rec. 1646 (1925) (remarks of Rep. McFadden). By allowing national banks to branch, the Act thus "protect[ed] national banks from the unrestrained branch bank competition of state banks." *Plant City*, 396 U.S. at 131; see *Walker Bank*, 385 U.S. at 257-258. At the same time, Congress protected state banks by permitting national banks to branch only "in those cities where State banks are allowed to have [branches] under State laws" (H.R. Rep. 83, *supra*, at 7). The Act thus adopted what Congress and this Court repeatedly have characterized as a policy of "competitive equality" between national and state banks. See *Plant City*, 396 U.S. at 131-134, 136, 138; *Walker Bank*, 385 U.S. at 258, 261.[16]

Against this background, the courts below relied on *Data Processing Organizations* and *Arnold Tours* to hold that respondent's claim falls within the zone of interests protected by the Act. But that reliance was misplaced. Those cases stand only for the proposition that, in the face of congressional silence about who is to benefit from given legislative action, the zone test is satisfied when "Congress ha[s] arguably legislated against the competition that the [plaintiff seeks] to challenge." *Investment Co. Institute*, 401 U.S. at 620. See *Arnold Tours*, 400 U.S. at 46; *Data Processing*

[16] As originally adopted, the Act permitted national banks to branch only in those cities where the bank had its main office. See 44 Stat. 1226. In 1933, Congress amended the Act to permit national banks (as well as state banks that were members of the Federal Reserve System) to branch statewide, if such branching was permitted to state banks by state law. See Ch. 89, § 23, 48 Stat. 189; *Walker Bank*, 385 U.S. at 259-260. This amendment "further strengthened the policy of competitive equality." *Plant City*, 396 U.S. at 132. See 77 Cong. Rec. 5896 (1933) (remarks of Rep. Luce).

Organizations, 397 U.S. at 155-156. Here, in contrast, there is no doubt that Congress had only one type of competitive injury in mind when it passed the Act—the type that national and state banks might inflict upon each other. Compare *Barlow* v. *Collins*, 397 U.S. 159, 164-165 (1970).[17] In such circumstances, there is no basis for inferring that Congress wished to afford other persons protection from the normal competition of the marketplace. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Instead, "[w]here Congress has * * * clearly defined the class to be protected, the zone test * * * prevent[s] groups outside of the class from usurping the legislative entitlement." *Leaf Tobacco Exporters Ass'n* v. *Block*, 749 F. 2d 1106, 1115 (4th Cir. 1984). See *Bank Stationers Ass'n* v. *Board of Governors*, 704 F.2d 1233, 1235-1236 (11th Cir. 1983); *In re Swearingen Aviation Corp.*, 605 F.2d 125, 127 (4th Cir. 1979); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759, 766 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Jaffe, *Standing Again*, 84 Harv. L. Rev. 634 (1971). It is thus the claims only of state and national banks that fall within the zone of interests protected by the Act. See App., *infra*, 3a, 6a (Scalia, J., dissenting).[18]

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[17] This case differs from *Data Processing Organizations* and *Arnold Tours* in another respect as well. Had the claims of the plaintiffs in either of those cases been held to be outside the zone of interests, judicial review of the agency action would have been effectively precluded. Here, in contrast, state banks (and perhaps other national banks) may challenge the Comptroller's national bank branching decisions.

[18] Respondent is not an appropriate party to advance the claims of state banks. See generally *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). And because no state bank challenged the Comptroller's action, the record below contains no evidence bearing on what, if any, competitive effect the Comptroller's decision will have on such banks. To the extent that respondent seeks to advance the interests of state banks, then, its claims do not arise "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Similarly, although respondent had standing to raise (see notes 5, 7, *supra*) its Glass-Steagall Act claim (see *Investment Co. Institute*, 401 U.S. at 620), it cannot " 'borrow' the arguable regulatory or protective intent embodied in one [statute], and apply it to a [statute] where that intent is not evident in order to satisfy the zone test." *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Cf. *Warth*, 422 U.S. at 500.

That the courts below reached a contrary conclusion is a consequence of what repeatedly has been characterized as "confusion and divergent approaches among lower federal courts" relating to the proper application of the zone test. *Copper & Brass Fabricators Council, Inc.* v. *Dep't of the Treasury*, 679 F.2d 951, 954 (D.C. Cir. 1982) (Ginsburg, J., concurring in the result). See *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1110; Note, *A Defense of the 'Zone of Interests' Standing Test*, 1983 Duke L.J. 447, 453-454. As the District of Columbia Circuit itself has recognized, " 'the most common pattern' " for courts to follow in zone of interest cases—and certainly the pattern that was followed below—" 'is to announce in conclusory terms that the zone standard has or has not been satisfied.' " *Copper & Brass Fabricators*, 679 F.2d at 954 (Ginsburg, J., concurring in the result), quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 139 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). This situation has prompted at least one appellate judge to suggest that "[c]larifi-

cation from the [Supreme] Court would facilitate the expeditious, even handed disposition of standing controversies by lower courts." *Copper & Brass Fabricators*, 679 F.2d at 955 (Ginsburg, J., concurring in the result). Given the clear error of the holding below, the Court might appropriately use this case to provide such clarification.[19]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1985

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[19] In light, however, of the importance of dispelling the cloud cast by the decision below on widespread practices in the banking industry, the Court may wish to grant certiorari limited to the substantive McFadden Act issue. Respondent's failure to fit within the zone presents only a statutory question; there obviously is adequate adversity of interest in this case to satisfy the requirements of Article III of the Constitution.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, ET AL., APPELLANTS

No. 84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C. T. CONOVER, Comptroller of the Currency,
Office of the Comptroller of the Currency

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 82-02865)

Argued March 25, 1985

Decided April 12, 1985

Before WRIGHT, GINSBURG, and SCALIA, *Circuit Judges.*

Opinion for the court *per curiam.*

Opinion concurring in part and dissenting in part filed by *Circuit Judge* SCALIA.

PER CURIAM: This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Memorandum Opinion. *See Securities Industry Ass'n v. Comptroller of the Currency,* 577 F. Supp. 252 (D.D.C. 1983). We note also that the District Court's Glass-Steagall Act analysis receives substantial support from a Supreme Court opinion issued while these cases were pending on appeal. *See Securities Industry Ass'n v. Board of Gov. of FRS,* —— U.S. ——, 104 S.Ct. 3003 (1984).

Affirmed.

SCALIA, *Circuit Judge,* concurring in part and dissenting in part: I concur in the court's disposition with regard to the Glass-Steagall Act. Instead of affirming the District Court's resolution of the McFadden Act issue on the merits, I would vacate and remand with instructions to dismiss for lack of jurisdiction.

The District Court found that SIA had standing to challenge the Comptroller's ruling that discount brokerage offices operated by national banks are not subject to the locational restrictions of the McFadden Act and the National Banking Act because "attempts to exceed those curbs would harm SIA's members . . . ." *Securities Industry Ass'n v. Comptroller of the Currency,* 577 F.Supp. 252, 258-59 (D.D.C. 1983). This conflates the constitutional requirement of injury in fact and the separate requirement that "Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute." *Glass Packaging Institute v. Regan,* 737 F.2d 1083, 1090 (D.C. Cir. 1984). In my view, state banks and possibly federal banks, but not all businesses injured in fact, are within the zone of interests protected by the branch banking restrictions. *See, e.g., id.* at 1088-89; *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury,* 679 F.2d 951, 952-53 (D.C. Cir. 1982); *Tax Analysts and Advocates v. Blumenthal,* 566 F.2d 130, 138, 144-45 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, ET AL., APPELLANTS

No. 84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C. T. CONOVER, Comptroller of the Currency,
Office of the Comptroller of the Currency

On Suggestions for Rehearing *En Banc* of the
Comptroller of the Currency, filed May 28, 1985,
and Intervenor, Security Pacific National Bank,
filed June 12, 1985

Opinion Filed July 12, 1985

Before: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The suggestions for rehearing *en banc* of Security National Bank and the Comptroller of the Currency have been circulated to the full Court. A majority of the judges of the court in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam

Chief Judge Robinson and Circuit Judge Wald did not participate in this order.

A dissenting statement of Circuit Judge Scalia, joined by Circuit Judges Bork and Starr, is attached.

SCALIA, *Circuit Judge*, with whom *Circuit Judges* BORK and STARR join, dissenting: The panel opinion in this case upheld the judgment of the District Court, in a suit brought by an association of brokerage houses, that the Comptroller violated sections 7(c) and 8 of the McFadden Act, 12 U.S.C. §§ 36(c), 81 (1982), in permitting national banks to conduct discount brokerage operations at locations other than their main banking offices and authorized branches.

The McFadden Act restricts only the *location* and not (unlike the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.) (1982)) the *nature* of bank activities. It is uncontroverted that its purpose was to establish competitive equality between state and federal banks by authorizing branching by federally chartered banks to the same extent as permitted to state banks by state law. Thus, state banks (and state banking commissions) are obviously within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy.

More importantly, however, the District Court, whose reasoning was adopted by the panel opinion, did not, in my view, base its standing decision merely on this erroneous construction of the language and purpose of the McFadden Act. My reading of the District Court opinion is that the Securities Industry Association's members (1) would have standing to sue under the Glass-Steagall Act, which restricts the scope of activities that national banks can engage in, and (2) would be actually harmed by attempts by national banks to exceed the locational curbs of the McFadden Act. This entirely reduces the "zone of

interest" inquiry under the McFadden Act to an inquiry into "injury in fact," as the conclusion of the McFadden Act standing portion of the opinion demonstrates:

> To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

Securities Industry Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 258-59 (D.D.C. 1983). But neither standing under the Glass-Steagall Act (a statute the functional equivalent of which was at issue in *Data Processing* and *Arnold Tours*) nor injury in fact—nor the two combined—suffice to satisfy the zone of interests test under the *McFadden Act*. Thus, the District Court opinion holds either that standing under one statute confers standing to raise challenges under a separate statute—which is inconsistent with *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 140-41 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), and indeed with the whole principle behind the zone test—or that injury in fact is sufficient to confer standing—which discards the zone test entirely.

On the merits, too, the District Court's—and thus the majority's—conclusion that discount brokerage offices operated by national banks are branches seems mistaken. The McFadden Act defines a branch to "include" any place "at which deposits are received,

or checks paid, or money lent," 12 U.S.C. § 36(f) (1982), which plainly does not describe a discount brokerage office. The District Court found, however, that the statutory definition of branches is not limited to offices performing one or more of these enumerated functions, basing this conclusion on remarks by Rep. McFadden made after passage of the Act, an opinion of the Eighth Circuit (followed nowhere else) finding trust offices to be branches, *St. Louis County National Bank v. Mercantile Trust Company National Ass'n*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), and dicta in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). It seems to me, however, that the *Plant City* dicta are virtually dispositive *in favor of the Comptroller*. The Court said:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include." *The definition suggests a calculated indefiniteness with respect to the outer limits of the term.* However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135 (emphasis added). It seems to me that a statute containing a "calculated indefiniteness" presents precisely the situation in which our deference to the agency should be at its height. *See Chevron, USA, Inc. v. NRDC, Inc.*, 104 S. Ct. 2778, 2782 (1984). The Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness—or indeed that the range includes *only*

the enumerated functions—cannot by any means be considered unreasonable, even if we think it mistaken.

This circuit plays a leading role in formulating banking law, and administrative law generally, and this case squarely presents important questions in both areas. I think it should have been heard by the full court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-2865

SECURITIES INDUSTRY ASSOCIATION, PLAINTIFF

v.

COMPTROLLER OF THE CURRENCY, ET AL., DEFENDANTS

Nov. 2, 1983

MEMORANDUM OPINION

FLANNERY, District Judge.

This matter is before the court on cross-motions for summary judgment. Plaintiff Securities Industry Association ("SIA"), a national trade association representing more than five hundred securities brokers, dealers and underwriters, challenges the actions of the Comptroller of the Currency, C.T. Conover, in approving the applications of two national banks for the establishment or purchase of discount securities brokerage subsidiaries. For the reasons set forth below, plaintiff's motion is granted in part and the Comptroller's decision is reversed.

Facts

On June 23, 1982 Union Planters National Bank of Memphis applied to the Comptroller for approval of the acquisition by Union Planters of Brenner Steed

and Associates, Inc., a discount brokerage business in Memphis, Tennessee. In its application Union Planters said it intended to offer securities brokerage services through Brenner Steed at certain branch offices of Union Planters in Tennessee, at affiliated banks in Tennessee, and at correspondent banks in Tennessee and six other states.

On July 2, 1982 Security Pacific National Bank applied to the Comptroller for approval of its proposed establishment of a new operating subsidiary to provide discount brokerage services. In its application Security Pacific said the new subsidiary would offer brokerage services at certain Security Pacific branch offices and might in the future offer those services at non-branch offices in California and other states. The new subsidiary will process and extend margin loans.

Brenner Steed is, and the Security Pacific subsidiary will be, "discount" brokerages, which will buy and sell securities solely as agent, on the order and for the account of customers. Neither will purchase or sell securities for its own account, nor engage in underwriting, nor give investment advice. "Discount" brokers are so characterized because their commissions are significantly lower than those charged by full-service brokers who, in addition to trading on behalf of customers, offer investment advice.

On August 26, 1982 the Comptroller approved the Security Pacific application. On September 20, 1982 the Comptroller approved the Union Planters application, and in September, 1982 Union Planters acquired Brenner Steed. This action followed.

Discussion

SIA argues that the Comptroller's decisions should be set aside as in excess of his statutory authority for

two reasons. First, the operation of a brokerage business by a national bank or its affiliate violates Sections 16 and 21 of the Glass-Steagall Act of 1933, 12 U.S.C. §§ 24 Seventh, 378. Second, the operation of a brokerage business by a national bank or its affiliate at offices other than those branches which the bank is allowed to establish consistent with state law violates the McFadden Act, 12 U.S.C. §§ 36, 81. The court addresses these two arguments below.

A. *Standard of review*

The degree of deference due the Comptroller was described by this court in *New York Stock Exchange v. Smith*, 404 F.Supp. 1091 (D.D.C. 1975), *vacated on other grounds*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1520, 55 L.Ed.2d 538 (1978) (*"NYSE"*):

> At the outset, the court notes that it gives "great weight" to the Comptroller's ruling. The Supreme Court has consistently held that reasonable constructions of regulatory statutes by the agencies charged with enforcement of those statutes are to be respected by reviewing courts. . . . The Comptroller's [ruling] will be respected, even if the court would have reached a different result were this a question of first impression.

404 F.Supp. at 1096 (Citations omitted). The reasons for the deference accorded the Comptroller are similar to those given by the court in *A.G. Becker, Inc., v. Board of Governors*, 693 F.2d 136 (D.C. Cir. 1982), explaining its deference to the opinions of that other federal body charged with banking regulation, the Board of Governors of the Federal Reserve System. In *A.G. Becker* plaintiffs, including SIA, challenged the Board's decision to allow Bankers Trust Company to act as agent in the sale of commercial paper. In upholding the Board's decision, and in reversing the district court, the court of appeals explained that the Board's decision warranted deference because of the scope of the Board's authority, its expert knowledge of commercial banking, and its application of general, undefined statutory terms to particular facts. The court wrote:

> The regulatory structure of the banking laws must be permitted to adapt to the changing financial needs of our economy. Congress has delegated to the Federal Reserve Board, rather than to this court, the complex task of applying the Act's general proscriptions to the current business reality. We must therefore defer to the Board's interpretation of the statute if that interpretation is reasonable.

693 F.2d at 141. For the same reasons, this court must uphold the Comptroller's decision if it is reasonable.

B. *The Glass-Steagall Act*

1. *The Act does not limit bank affiliates to securities transactions solely for pre-existing customers*

SIA argues that Glass-Steagall permits banks to provide brokerage services only to pre-existing, bona fide bank customers. Glass-Steagall, says SIA, intended to erect impenetrable barriers between commercial banks and investment banks in order to avoid the kind of rampant speculation of the 1920's which brought the banking system to the brink of collapse, when banks would use depositors' money to push

speculative securities out on the market. In support of its argument SIA points to two provisions of Glass-Steagall. Section 21, 12 U.S.C. § 378, prohibits any organization "engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . securities . . ." from engaging at the same time in the banking business.[1] Discount brokers engage in the retail purchase and sale of securities and so, argues the SIA, are prohibited from being part of a banking business at the same time.

Section 16, 12 U.S.C. § 24 Seventh, limits bank brokerage activity to that "upon the order, and for the account of, customers . . .."[2] This section, says

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[1] Section 21 of the Glass-Steagall Act, 12 U.S.C. § 378, provides in pertinent part:

> [I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies . . . or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title.

[2] Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24, Seventh, provides in pertinent part:

> The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association will not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

SIA, is a very limited exception to the otherwise unyielding barrier between commercial and investment banking established by Glass-Steagall, and exists only in order to accommodate existing bank customers. In support of its position, SIA cites several early Comptroller opinions holding that Section 16 limits bank brokerage transactions to those performed for customers of the bank whose relationship with the bank exists independently of the securities transaction. *See, e.g.,* 1 *Bulletin of the Comptroller of the Currency* No. 2 at 2 (Oct. 26, 1936). Although the first such opinion dates from 1936, SIA maintains that the Comptroller has affirmed that interpretation of Section 16 until today. The SIA concedes that the Comptroller modified his position in 1974 when, in approving an application to provide Automatic Investment Services, a ruling upheld by this court in *New York Stock Exchange v. Smith, supra,* the Comptroller reversed his prior interpretations to say that "accommodation" did not mean that banks could not charge customers for the brokerage service. But the Comptroller left untouched, says SIA, the requirement that the customer relationship exist independent of the securities transaction conducted as part of the brokerage services.

The court is not persuaded by SIA. The language of Section 16 limiting bank securities to those "for the account of customers" does not limit bank brok-

erage activity, but serves to distinguish such activity from buying and selling of securities by the bank for its own account. Despite the exhaustive cataloging in the legislative history of Glass-Steagall of the ills arising out of the previous intermingling of investment and commercial banking, *see, e.g.*, S. Rep. No. 77, 73rd Cong., 1st Sess. 8-10 (1933), there is no mention of limiting bank brokerage activity. On the contrary, the one mention appearing in the legislative history says that Glass-Steagall will permit national banks to sell and buy securities for their customers "to the same extent as heretofore." *Id.* at 16. And as the Comptroller demonstrates, through citation both to earlier case law and secondary sources, prior to the passage of Glass-Steagall banks offered brokerage services to members of the general public, and not just to existing customers. *See, e.g., Blakey v. Brinson*, 286 U.S. 254, 52 S.Ct. 516, 76 L.Ed. 1089 (1932); *McNair v. Davis*, 68 F.2d 935 (5th Cir. 1934), *cert. denied*, 292 U.S. 647, 54 S.Ct. 780, 78 L.Ed. 1497 (1934).

The early opinions of the Comptroller relied on by SIA embody "an overcautious approach to bank regulation reflecting the atmosphere of the years immediately after the 1929 market crash . . ." *NYSE, supra*, 404 F.Supp. at 1097, and have gradually been disavowed by the Comptroller in the intervening decades. As the Comptroller stated in 1974, commenting on his reversal of an earlier decision disallowing bank charges for brokerage services:

> This [earlier] view, like many others expressed by regulators, in the immediate post-depression decades, was designed to be ultra-conservative and to confine banks as narrowly as possible in their activities. However, in this regard, the office apparently went further in the direction of conservatism than did the Congress, since neither the word nor the idea of the "accommodation" limitation appears in the statute or in any committee or floor comments.

Letter from James E. Smith, Comptroller of the Currency, to G. Duane Vieth (June 10, 1974), *reprinted in* [1973-78] Fed. Banking L. Rep. (CCH ¶ 96,272).

The court's understanding of the scope of the prohibitions of Glass-Steagall is reinforced by analysis of Section 20 of the statute, 12 U.S.C. § 377, which provides that a bank may not be affiliated with any organization which is "engaged principally in the issue, flotation, underwriting, public sale, or distribution of stocks, bonds, debentures, notes or other securities." [3] The language of Section 20 makes clear that the line Congress sought to draw between commercial and investment banking did not prohibit bank affiliate brokerage activity. The prohibition of Section 20 is clearly aimed at the investment banking business by which large blocks of securities newly-issued by corporations are brought by investment banks for resale to the public. In such a transaction the investment banks buy for their own account and assume the risk that the market may not be recep-

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[3] Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377, provides in pertinent part:

> [N]o member bank shall be affiliated . . . with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

tive to these securities. Such activities are, therefore, fundamentally different from brokerage activities, where the broker buys and sells only as agent and for the account of the customer. The phrase "at retail" in the statute may not be read to encompass brokerage activities because it must be read consistently with the other words in the same phrase. *Third National Bank in Nashville v. Impac, Ltd.*, 432 U.S. 312, 322, 97 S.Ct. 2307, 2313, 53 L.Ed.2d 368 (1977).

The court's conclusion is in accord with the opinion of the Board of Governors of the Federal Reserve Board approving the purchase by Bank America Corporation, a bank holding company regulated by the Board pursuant to the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.*, of the discount brokerage services through its wholly-owned subsidiary Charles Schwab & Co., Inc., 69 Fed. Res. Bull. 105 (1983). In its opinion the Board analyzed Sections 20 and 16 of the Glass-Steagall Act and concluded that the acquisition and operation of a discount brokerage service by a member bank was consistent with both the language and purpose of the Act. The Board's opinion was affirmed by the Second Circuit in *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 716 F.2d 92 (2d Cir. 1983).

2. *The requirement that bank purchases and sales of securities be "without recourse" does not prohibit brokerage activity by bank subsidiaries*

Section 16 of the Glass-Steagall limits bank securities dealings to buying and selling of securities "without recourse." SIA contends that the phrase "without recourse" must not be given a technical, commercial meaning, but must be read broadly. SIA relies on the case of *Awotin v. Atlas Exchange Bank of Chicago*, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393 (1935), where the Supreme Court wrote:

> The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of "recourse" growing out of the transaction of the business.

A brokerage subsidiary of a national bank could become contingently liable on a securities transaction, argues SIA, if the customer buyer failed to pay for the securities or if the customer seller failed to deliver the securities as promised. Such liability is prohibited by the "without recourse" limitation, says SIA.

SIA's reliance on *Awotin* is misplaced. In that case banks had agreed by separate contract to repurchase bonds at maturity at par plus accrued interest—the very sort of guarantee the Comptroller admits is prohibited by Section 16, but which is absent from a brokerage transaction. The *Awotin* court simply held that the "without recourse" language reached "any other form of contract by which the bank assumes the risk of loss which would otherwise fall on the buyer of securities." 295 U.S. at 211-12, 55 S.Ct. at 675-76. This is not the risk a bank incurs in a brokerage transaction.

As the Federal Reserve Board explained in its *Bank America* decision: "The ordinary commercial meaning of 'without recourse' indicates that section 16 prohibits a bank from assuming the liability of endorser or maker with respect to the securities bought or sold as agent of the customer." *In re Bank Amer-*

ica Corp., 69 Fed.Res.Bull. at 115, n. 50. The Second Circuit upheld that determination, writing:

> [W]e do not think that Schwab trades "without recourse" simply because it faces the kind of incident liability to which SIA refers. Schwab can maintain actions for breach of contract against customers who fail to pay for or deliver securities and thus, giving the words their ordinary meaning, is not "without recourse" against such customers.

Securities Industry Association v. Board of Governors of the Federal Reserve System, supra, 716 F.2d 92 at 100 n. 4.

In accordance with the foregoing, the court holds that the Glass-Steagall Act does not prohibit the ownership and operation by national banks of subsidiaries engaged in the brokerage business.

C. *The McFadden Act*

The National Bank Act of 1864, which created national banks, originally allowed national banks to operate only out of one central office named in the bank's certificate of incorporation. The statute provided:

> The usual business of each national banking association shall be transacted at an office or banking-house located in the space specified in its organization certificate.

R.S. 5190 (1864).

Later, state banks began to establish branch offices. In order to equalize competion between state and national banks Congress amended the banking laws

in 1972 in the McFadden Act to provide that national banks could carry on their general business not only at the central office, but also at branch offices which they could establish, upon Comptroller approval, to the extent which state law permitted state banks to establish branches. Section 8 of the McFadden Act amended the National Bank Act to provide:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with [12 U.S.C. § 36].

R.S. 5190, 12 U.S.C. § 81.

"Branches" were defined in Section 36(f) of the Act:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f).[4]

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[4] 12 U.S.C. § 36 provides, in pertinent part:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said asociation is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by impli-

SIA argues that, if it is legal for national banks to carry on brokerage activity through their subsidiaries, then at the very least the banks' operation of their brokerages must be limited to the branch offices they are presently permitted. Both Union Planters and Security Pacific indicated their intention to operate their brokerage subsidiaries at non-branch offices within their respective states, as well as at offices in other states across the country. Still, the Comptroller approved their applications. The Comptroller's decision, contends SIA, exceeded his authority and is contrary to the branching restrictions of the McFadden Act and so must be overturned.

1. *Standing*

The Comptroller responds to SIA's challenge by arguing first that SIA is without standing to bring it. Any additional injury which SIA might suffer from the location of brokerage subsidiary offices at places other than the bank's central office and chartered branches is speculative, says the Comptroller. And the McFadden Act branching restrictions were designed to promote competitive equality between state and national banks, not to protect securities dealers. SIA can show no injury and is not within the zone of interests sought to be protected by the Act, concludes the Comptroller, and therefore is

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cation or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

* * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received, or checks paid, or money lent.

without standing to challenge the Comptroller's decision under the Act.

The Comptroller's argument is not persuasive. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) ("*Data Processing*"), the Supreme Court held that an organization of providers of data processing services had standing to challenge a ruling by the Comptroller permitting national banks to make data processing services available to other banks and to bank customers. The organization had standing, the court explained, in part because they had alleged that "competition by national banks in the business of providing data processing services might entail some future loss of profits for petitioners." 397 U.S. at 152, 90 S.Ct. at 829. Similarly, SIA has alleged that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them. And it is obvious that the greater number of offices from which banks are allowed to conduct their brokerage business, the greater will be the inroads the banks will be able to make into the business of SIA's members. Accordingly, SIA has alleged sufficient injury to confer standing.

Nor need there be any explicit expression in the statute or its legislative history for the court to find that SIA is within the zone of interests protected by the McFadden Act. In *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970), the Supreme Court reversed the dismissal for lack of standing of a complaint by independent travel agents who challenged the Comptroller's ruling that national banks may provide travel services for their customers. The court, relying on *Data Processing*, noted "a growing trend 'toward enlargement

of the class of people who may protect administrative action.'" 400 U.S. at 46, 91 S.Ct. at 159. The court in *Data Processing* "did not rely on any legislative history showing that Congress desired to protect data processors alone." *Id.* The question is whether a challenged statute "'arguably brings a competitor within the zone of interests protected by it.'" *Id.*

The only mention of *Data Processing* of the legislative history of the statutory provision at issue was that the provision was a "response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled 'banks to engage in a nonbanking activity,' and thus constitute 'a serious exception to the accepted public policy which strictly limits banks to banking.'" *Arnold Tours, supra*, 400 U.S. at 46 n. 3, 91 S.Ct. at 159 n. 3, quoting *Data Processing, supra*, 397 U.S. at 155, 90 S.Ct. at 830 (citations omitted). Similarly here, the branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities. To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

2. The McFadden Act limits the business of a national bank's discount brokerage subsidiary to the bank's central office and chartered branches

On the merits, the Comptroller argues that the branching restrictions of the McFadden Act apply only to the three activities which are enumerated in the definition of "branch" within the statute: receipt of deposits, payment on checks, or lending money. Only one of these activities will even arguably exist at the brokerage offices—the lending of money when the brokerage extends margin loans to customers, but those loans will only "originate" at the brokerage offices. Final approval will be given at the central office, and under Comptroller regulations, 12 C.F.R. § 6.7380, the origination of a loan later approved at another office does not constitute the lending of money by the originating office. Because brokerage activities are not among those enumerated in the Act, says the Comptroller, its restrictions do not apply. In any event, he concludes, the Act limits only the branches which a national bank may have within the state of its central office. No restrictions apply to offices outside that state.

After careful consideration of the Comptroller's decision, and with due regard for the deference owed him, the court finds that the Comptroller exceeded his authority, in contravention of law, in approving the applications of Union Planters and Security Pacific without regard to the branching restrictions of the McFadden Act. The Comptroller's literal reading of the statute is contradicted, first, by the legislative history of the Act. Shortly after the Act's passage, is sponsor, Representative McFadden, placed a section-by-section analysis of it in the Congressional

Record. That analysis described the definition of "branch" in Section 36(f) as follows:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office* is a branch if it is legally established under the provisions of this act.

69 Cong.Rec. 5816 (1927) (emphasis added). Although the Comptroller urges the court to disregard Representative McFadden's remarks because they came after the Act's passage, other courts have cited the above passage as authoritative. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 134 n. 8, 90 S.Ct. 337, 343 n. 8, 24 L.Ed.2d 312 (1969); *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 931-32 (D.C.Cir. 1976).

The Supreme Court has indicated that a broader, more flexible interpretation must be made of the statute than that followed by the Comptroller. In *Dickinson, supra*, the Comptroller gave a national bank in Florida permission to operate an armored car and a secured receptacle in a shopping center, both staffed by tellers, for the receipt of deposits and cashing of checks by customers. State banking regulators ordered the bank to stop providing the off-premises services because Florida law prohibits branch banking altogether. The bank brought suit for declaratory and injunctive relief in federal court. The Supreme Court held that the off-premises services constituted a "branch" in violation of the McFadden Act, and in doing so explained:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include". The definition suggests a *calculated indefiniteness* with respect to the outer limits of the term. However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; *it may include more.*

396 U.S. at 135, 90 S.Ct. at 344 (emphasis added).

Other courts faced with similar questions have expressly held that bank offices at which business is conducted other than the three functions enumerated in the Act nonetheless are "branches" within Section 36 and therefore subject to state law restrictions on branch locations. In *St. Louis County National Bank v. Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir.1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2975, 54 L.Ed.2d 1093 (1977), the Comptroller approved the establishment by Mercantile of a trust office in a St. Louis suburb. A state bank brought suit for declaratory and injunctive relief, contending that the trust office had been established in violation of state law limiting bank branches. Mercantile argued, as does the Comptroller here, that because the trust office did not receive deposits, pay checks, or lend money, the McFadden Act did not apply. The Eighth Circuit rejected the argument, affirming the district court grant of injunctive relief, concluding "the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking." 548 F.2d at 719. Examining the services provided by the trust office, the court found

that the office performed services routinely offered at the bank's main office and increased convenience for the bank's customers. Based on those facts, the court held that the trust office was a "branch" within Section 36(f). *Cf. Colorado v. First National Bank of Fort Collins*, 540 F.2d 497, 499-500 (10th Cir.1976) ("accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank at the present time provides many other services"), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1102, 51 L.Ed.2d 537 (1977).

This court has held that the Glass-Steagall Act permits national banks to operate discount brokerage subsidiaries. The provision of brokerage services as described in the Security Pacific and Union Planters applications—at numerous locations in many states —is clearly aimed at attracting and servicing customers conveniently. The brokerage business, therefore, is within the category of "general business" which national banks may conduct at their main office and, as such, is subject to the branching restrictions in 12 U.S.C. § 81 and 12 U.S.C. § 36.

The Comptroller's final argument that the McFadden Act restrictions apply only to branches within the state where the bank has its central office must also be rejected. It ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the location of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintain offices outside their home state.

In accordance with the foregoing, the court holds that an office of a national bank for the conduct of discount brokerage activities is a "branch" within the

definition of Section 36(f) of the McFadden Act, subject to state law restrictions on the establishment of bank branch offices. The Comptroller's decision to the contrary, in approving the applications of Security Pacific and Union Planters for the establishment or purchase of a discount brokerage subsidiary without regard to the branching restrictions of the McFadden Act, shall therefore be reversed.

The parties shall submit proposed Judgments in accordance with this Opinion within ten days of the date of its filing.

APPENDIX D

COMPTROLLER OF THE CURRENCY
ADMINISTRATOR OF NATIONAL BANKS
Washington, D.C. 20219

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY SECURITY PACIFIC NATIONAL BANK TO ESTABLISH AN OPERATING SUBSIDIARY TO BE KNOWN AS SECURITY PACIFIC DISCOUNT BROKERAGE SERVICES, INC.

DECISION

Background

Security Pacific National Bank (Security Pacific), Los Angeles, California, proposes to establish an operating subsidiary to be named Security Pacific Discount Brokerage Services, Inc. (Discount Brokerage). The subsidiary will engage, solely as agent on behalf of its customers, in the purchase and sale of all types of securities. It will also provide margin loans to customers and pay interest on credit balances in customer accounts in accordance with applicable requirements. These services will initially be offered to the public throughout the State of California at authorized branch offices. However, Discount Brokerage intends ultimately to offer these services at non-branch locations inside and outside California. It also intends ultimately to make these services available to the customers of other financial institutions that will act as introducing brokers. Certain incidental operations, such as maintaining record custody of customer's securities and clearing and settlement of

transactions, may be performed at an office outside California.

Discount Brokerage will be a registered broker-dealer under the Securities Exchange Act of 1934, registering first with the Securities and Exchange Commission and later with the National Association of Securities Dealers. It will also register with the California Department of Corporations and, to the extent required, other state securities commissions. Discount Brokerage may also seek membership on one or more national securities exchanges.

Applicability of the Glass-Steagall Act

A reading of the provisions of the Banking Act of 1933 commonly referred to as the Glass-Steagall Act —*i.e.*, Sections 16, 20, 21, and 32—and of the relevant legislative history and judicial decisions makes it clear that only certain specified securities activities are prohibited to banks. Specifically, Section 16 of the Act, codified in 12 U.S.C. § 24 (Seventh), states that national banks may not, with various exceptions not relevant here, "underwrite any issue of securities or stock." The Section, however, further delineates permissible and impermissible activities in stating that the "business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account." Thus, on its face, the Glass-Steagall Act permits those securities purchases and sales for customers in which the bank acts in the capacity of agent (*i.e.*, brokerage transactions), while generally prohibiting purchases and sales by banks acting as

principal. This constitutes clear authorization for banks and, hence, their operating subsidiaries (*see* 12 C.F.R. § 7.7376) to engage in the activities contemplated for Discount Brokerage.

Certain early opinions of this Office imposed limitations upon the securities brokerage activities of national banks. As early as 1936, the Office expressed the opinion that national banks could purchase and sell securities only for existing customers of the bank and had to receive prior payment or have assets of the customer on hand to cover the transaction. Transactions were to be undertaken solely as an accommodation to the existing customers, and compensation was limited to the fair cost of handling the transaction. 1 *Bull. of the Comptroller of the Currency*, No. 2, at 2-3 (Oct. 26, 1936). These views were codified in Paragraph 220 of the Comptroller's first *Digest of Opinions* in 1948, although the compensation provision was relaxed slightly. It was relaxed further in Paragraph 220A of the 1957 edition of the *Digest of Opinions*. In 1963, when the *Digest of Opinions* was superseded by the *Comptroller's Manual for National Banks*, all the provisions limiting the securities brokerage activities of national banks were deleted entirely.

The Office's early restrictive views are explained in a 1974 letter by Comptroller James E. Smith as reflecting "the great caution of banking regulations in the years immediately following the 1931-32 debacle." Letter to G. Duane Vieth (June 10, 1974). The letter went on to state that the early interpretations contained restrictions not imposed by the statute and accordingly were currently viewed to be erroneous. The letter enunciated this position in permitting national banks to offer Automatic Investment Service (AIS) programs to customers. Under AIS programs banks would provide lists of corporations to their customers and then periodically purchase for them shares of stock of the companies selected by the customers from the list, paying for the securities by debiting the customers' checking accounts. The brokerage services thus offered AIS customers are functionally equivalent to, albeit somewhat more narrow in scope than, the services Security Pacific proposes to offer to Discount Brokerage customers. As in the case of an AIS program, as discussed in detail in the 1974 letter, the services covered by this application are clearly authorized by the language of Section 16 of the Glass Steagall Act and do not contravene the purposes of the Act, either by subjecting banks to material risks or by placing them in situations with unacceptable conflicts of interest deriving from the promotional pressures facing them. *See Investment Company Institute v. Camp*, 401 U.S. 617, 631-38 (1971).

The rejection of the restrictive position reflected in the Office's early opinions has found support in the courts. In *New York Exchange, Inc. v. Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated on other grounds sub nom. New York Stock Exchange v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978), the court upheld the broader position adopted in the 1974 AIS letter. Specifically citing the argument made in the 1974 AIS letter that the early opinions "embodied an overcautious approach to bank regulation reflecting the atmosphere [sic] of the years immediately after the 1929 market crash rather than the legislative history of the act," the court went on to endorse AIS programs as falling within the statutory authorization of Section 16 of the

Act and not presenting any of the risks discussed in the Act's legislative history or the judicial elaboration of it. *New York Stock Exchange, Inc. v. Smith, supra,* at 1097-1100.

Various statements by the Supreme Court in cases addressing Glass-Steagall Act issues suggest that the express language of the Act is the primary factor in any analysis and that securities brokerage activities by banks are not proscribed by the Act. In *Investment Company Institute v. Camp,* 401 U.S. 617 (1971), the Court analyzed a bank's participation in the organization, distribution, and marketing of shares of an investment company consisting of commingled managing agency account assets held by the bank as fiduciary. The Court found the bank's participation to clearly contravene the express language of Section 16 of the Act and to further subject the bank to the risks and conflicts Congress sought to obviate by the Act. Accordingly, the Court found the bank's program to be in violation of the Act. The Court was careful, however, to distinguish this prohibited activity from permissible activities, including purchases as agent for customers of securities. *Id.* at 623 n.10, 624-25

The same type of statutory analysis was used by the Court in *Board of Governors of the Federal Reserve System v. Investment Company Institute,* 450 U.S. 46 (1981). That case upheld a ruling of the Federal Reserve Board (FRB) that serving as investment adviser to an open-end investment company and organizing and sponsoring, subject to certain limitations, a closed-end investment company were closely related to banking and could legally be undertaken by bank holding companies and their nonbank subsidiaries. The Court could find no prohibition of this conduct in the various provisions of the Glass-Steagall Act and accordingly rejected arguments based solely on broad statements of the policies embodied in the Act. The Court described the analysis employed in *Investment Company Institute v. Camp, supra,* as relying "squarely on the literal language of §§ 16 and 21 of the Glass-Steagall Act." 450 U.S. at 65. The Court went on to explain that the analysis of the risks presented in the earlier case was necessary only to respond to arguments on behalf of the bank that despite the literal prohibition on the conduct then at issue it was not the intent of Congress to prohibit it. 450 U.S. at 66. The Court also reiterated its earlier views that purchases of securities by banks acting as agent for their customers are specifically authorized by the Glass-Steagall Act. 450 U.S. at 55-56 n.18.

There is language in the legislative history of the Glass-Steagall Act to the effect that national banks were to be authorized by Section 16 to engage in securities brokerage transactions "to the same extent as heretofore." This language appears only to have meant generally that the ability of national banks to engage in brokerage transactions was to be subject to no additional constraints after the enactment of the Glass-Steagall Act beyond those applicable before its enactment. This analysis appears to have been adopted by the court in *New York Stock Exchange, Inc. v. Smith* 404 F. Supp. 1091, 1098. Noting that there was considerable evidence that prior to 1933 banks did engage in brokerage transactions, the court concluded that even if the AIS programs under consideration were viewed as a more extensive involvement by banks in the brokerage business than existed

prior to 1933, they nonetheless were not prohibited by the statutory language or the legislative history if they did not give rise to risks materially different from those normally associated with brokerage transactions. In view of the significant changes that have taken place since 1933 in the nature and delivery of brokerage services, this approach seems particularly appropriate.

The same argument concerning the "heretofore" language applies to the incidental activities that Security Pacific intends to perform through Discount Brokerage. That is, such functions as maintaining custody of securities for customers and clearing and settling their securities transactions, even in the absence of evidence that banks provided those services prior to 1933, do not exceed the statutory authorization in Section 16 of the Glass-Steagall Act so long as Discount Brokerage maintains its agency status in the transactions. Since these activities do not involve Discount Brokerage's taking any position in securities and do not create any promotional pressures by associating Discount Brokerage's name or financial prospects (or Security Pacific's) with that of any securities issuer, they do not appear to give rise to any of the risks the Act sought to address. It should also be noted that these types of activities are regularly performed by national banks, without any explicit statutory authorization beyond the incidental powers language of 12 U.S.C. § 24 (Seventh), in connection with the U.S. government and municipal securities dealer activities authorized in that Section.

The "heretofore" language in the legislative history could also be cited in connection with Security Pacific's intention to seek membership on national securities exchanges for Discount Brokerage. Because

of certain rules of at least the New York Stock Exchange (NYSE) prior to 1933, direct stock exchange membership by a national bank would have been impossible then. However, the large commercial banks clearly did have their representatives on the floor of the exchanges. *See, e.g.*, Sobel, *NYSE* 13-14 (1975). Further, various private bankers were members of the exchanges prior to the passage of the Glass-Steagall Act and at least one such company has maintained continuous NYSE membership since before the passage of the Act. In this regard, the NYSE proposed to adopt new Rule 310 in 1976 that would have prohibited a commercial bank not then a member of the NYSE from becoming such a member. The Glass-Steagall Act was cited by the NYSE as one reason for proposing the rule. In rejecting this rule, the Securities and Exchange Commission expressed skepticism about permitting existing bank members of the NYSE to retain their membership while prohibiting additional banks from joining, since Section 21 of the Glass-Steagall Act * (12 U.S.C. § 378) does not contain a grandfathering exception. The Commission concluded, quite properly, that the NYSE's position was subject to substantial doubt and, in any event, that resolution of the issue should be left to the federal banking agencies or the courts. *See* Securities Exchange Act Release No. 12737 (Aug. 25, 1976).

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* Section 21 of the Glass-Steagall Act prohibits any person engaged in the issuing, underwriting, selling, or distributing of securities from also engaging in the business of receiving deposits. The Section expressly states, however, that activities authorized by Section 16 of the Glass-Steagall Act are not prohibited for depository institutions, including private bankers.

Whatever the pre-1933 history reveals with respect to exchange membership, however, should not be determinative of whether national banks may now be such members. The relevant concern is whether national banks as exchange members can conform their functional participation in securities transactions to the agency role permitted in Section 16 of the Glass-Steagall Act. Since acting solely in an agency capacity is possible, *see, e.g.*, NYSE Rule 91, and is the stated intention of Security Pacific for Discount Brokerage, exchange membership will not create any risks inconsistent with the brokerage role envisioned in the Act as permissible for national banks.

An additional Glass-Steagall Act issue arises when a bank chooses to conduct securities brokerage operations through an operating subsidiary. Section 20 of the Act, 12 U.S.C. § 377, prohibits affiliations between member banks, including all national banks, and companies "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities." Early on, the Supreme Court interpreted the identical list of restricted functions in Section 32 of the Glass-Steagall Act, 12 U.S.C. § 78, not to include securities brokerage activities of a company. *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441, 445-49 (1947). Such an interpretation seems appropriate and is, of course, entirely consistent with the view that Congress was trying to eliminate only certain risks, not including those associated with securities brokerage activities, from the commercial banking system.

Accordingly, the activities proposed by Security Pacific for Discount Brokerage are within the corporate

powers of national banks and their operating subsidiaries and are not limited by the Glass-Steagall Act.

McFadden Act

Security Pacific's application indicates that it intends to offer Discount Brokerage's services through offices that are not bank branches or the bank's main headquarters, as well as through chartered offices. It is, of course, an element of our approval of the application that the geographic limitations effectively imposed by the National Bank Act's branching provisions, commonly referred to as the McFadden Act, not be violated. 12 U.S.C. § 36. "Branch" is statutorily defined to include "any branch bank, branch office, branch agency, additional office or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). Security Pacific's legal memorandum, submitted as part of the application, expresses the opinion that the non-chartered offices at which Discount Brokerage will offer its services will not constitute branches under the McFadden Act because none of the statutory branching functions will be performed there.

Lending Money

Regarding the lending of money, the application states that Discount Brokerage will not make margin loans at non-branch offices. Such offices will be limited to the performance of tasks associated with loan origination within parameters analogous to those authorized by the Comptroller's Interpretive Ruling 7.7380 (12 C.F.R. § 7.7380). Interpretive Ruling 7.7380 authorizes the

> [o]rigination of loans by employees or agents of a national bank or of a subsidiary corporation at

> locations other than the main office or a branch office . . . [*p*]*rovided*, [t]hat the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.

12 C.F.R. § 7.7380(b).

The Comptroller has identified certain loan solicitation and origination activities that clearly may be performed by loan production offices within the scope of the Interpretive Ruling. These include:

1) solicitation of loan business, including by means of advertisements disclosing the nature and limitations of the [loan production office];

2) providing information as to loan rates and terms;

3) interviewing and counseling applicants regarding loans (only), including the provision of disclosures required by regulations;

4) aiding customers in the completion of loan applications.

See, e.g., Letter from John G. Heimann, Comptroller of the Currency, to Exchange National Bank & Trust Company of Atchison, Atchison, Kansas (Jan. 31, 1979).**

** In *Independent Bankers Association of America v. Heimann*, 627 F.2d 486, 488 n.** (D.C. Cir. 1980) (*IBAA v. Heimann*), the court expressed general agreement with the non-branch status of loan production offices engaging in the limited array of functions set out in the letter.

Security Pacific's legal memorandum indicates that Discount Brokerage offices at non-branch locations will interview and counsel customers on loan rates and terms and aid customers in the completion of margin loan applications. Loan applications will then be transmitted to a chartered office at which they will be processed and at which any credit will be extended. The performance of these and other solicitation and origination activities, analogous to those outlined above, at non-branch Discount Brokerage offices in connection with the extension of margin credit at chartered offices would not, in our opinion, constitute lending money within the meaning of the McFadden Act.

Receiving Deposits

In addition to margin lending, Discount Brokerage will also maintain, and pay interest on, customer credit balances arising incidental to its brokerage business, including (1) funds awaiting investment, (2) interest or dividends received on a customer's securities held in "street" name and (3) proceeds from securities sold by the broker awaiting reinvestment or other instructions from the customer. Security Pacific takes the position that these credit balances are not deposits and, therefore, that Discount Brokerage will not be receiving deposits within the meaning of the McFadden Act.

Credit balances arising incidentally to brokerage activities may be distinguished, as correctly noted in Security Pacific's legal memorandum, on certain functional and legal grounds from bank deposits. Bank deposits are generally funds placed with a depository institution for the primary purpose of safekeeping,

earning a return in the form of interest, or facilitating payments to third parties. They may be withdrawn at the discretion of the depositor under the terms and conditions of the account. The receipt of deposits is a principal function of banks, which publicly solicit deposits to provide funds to be used in the banks' lending business. Credit balances maintained by brokers, on the other hand, arise in connection with securities transactions of customers and, as such, are not directly solicited from the public. Indeed, the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, operates to restrict the advertising, promotional and selling practices of brokers regarding interest-bearing free credit balances. *See* Securities Exchange Act Release No. 18262 (Nov. 17, 1981). Further, there are specific regulatory restrictions regarding the use of credit balances by brokers. 17 C.F.R. § 240.15c3-2.

It should be noted, too, that securities firms regularly maintain and pay interest on customer credit balances, apparently in the belief that this practice does not violate the prohibition in Section 21 of the Glass-Steagall Act against the receipt of deposits by such firms. 12 U.S.C. § 378(a)(1). The prevalence of this practice argues against the characterization of customer credit balances as deposits generally.

Security Pacific also points to the non-deposit treatment of credit balances by the FRB in connection with balances maintained by "agencies" under the International Banking Act of 1978, 12 U.S.C. § 3101 *et seq.*, and by investment companies chartered under Article XII of the New York Banking Law. The value of these examples, which have been drawn from the specialized context of international finance, is, however, clouded by the inclusion of "credit balances" within the definition of "deposits" in FRB Regulation D, 12 C.F.R. § 204.2(a)(1)(vi). Even assuming that credit balances are treated as deposits for the narrow monetary control purposes of Regulation D, however, it should be recognized that the meaning of deposit may be different in other regulatory or statutory contexts, such as under the McFadden Act. Based on all of the foregoing considerations, it is our opinion that credit balances arising in connection with securities brokerage transactions are not deposits within the meaning of the McFadden Act.

Non-enumerated Functions

It is further possible that Discount Brokerage offices could be found by a court to be branches within the meaning of the McFadden Act even in the absence of a finding that they receive deposits, pay checks or lend money. In *St. Louis County National Bank v. Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir.), *cert. denied*, 433 U.S. 909 (1977) (*St. Louis County*), a trust office operated by a national bank, which conducted a substantial amount of trust business at its main office, was held to be a branch, even though no deposits were received, checks paid or money lent at such office.

In the view of the Eighth Circuit, at least, the transaction with the public of certain business routinely carried on at the bank's main office constitutes branch banking activity for McFadden Act purposes. This Office finds the approach taken by the court in *St. Louis County* an overly broad reading of the statute, and we believe that the court's holding should at the very least be limited to those dealings with the public

requiring a specialized banking or similar license. In any event, finding that securities brokerage activity constitutes a branch banking function would appear particularly inappropriate in view of the number of banks currently operating U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra- tate and interstate basis.

The application states the intention that an operations department, perhaps located outside California, will maintain record custody of securities held in accounts and be responsible for clearing and settlement of transactions, although initially a clearing broker may be employed to carry on some of these activities. A number of banks currently operate similar non-branch facilities to carry out these ministerial tasks relating to their municipal and government securities dealing and underwriting activities. Since the McFadden Act issue would be the same in the case of the Discount Brokerage operations department, the long-standing and widespread nature of the practice of bank municipal and government securities dealers is obviously relevant. It is, therefore, our opinion that ministerial functions not involving direct dealing with the public, such as the maintenance of record custody and the clearing and settlement of transactions, do not constitute branching functions either as enumerated in Section 36(f) or even under the expansive *St. Louis County* approach. *Cf. Independent Bankers Association of America v. Smith,* 534 F.2d 921, 936 (D.C. Cir. 1976) (no competitive advantage in dealing with public can arise from these ministerial services).

Location Where Services Are Provided

It is, of course, an element of our approval of the application that all essential branch banking functions performed in connection with Discount Brokerage's operations be performed at chartered offices. In our opinion, the activities of Discount Brokerage, viewed individually or collectively (with the exception of the making of margin loans, treated separately above), should reasonably be found not to constitute branch banking for purposes of the McFadden Act.

FRB Regulations D and Q

It is also an element of approval of the application that Discount Brokerage and Security Pacific comply with FRB Regulation D, 12 C.F.R. Part 204, and FRB Regulation Q, 12 C.F.R. Part 217. Security Pacific states in its legal memorandum that Regulations D and Q are not applicable because credit balances arising in the course of a brokerage business are not deposits within the meaning of those regulations. As pointed out earlier, however, Regulation D seemingly defines "deposits" to include "credit balances," 12 C.F.R. § 204.2(a)(1)(vi). And even though Discount Brokerage would not appear to be a "depository institution," as defined in 12 C.F.R. § 204.2(m)(1)(i), its "obligations" may be treated as "obligations" of Security Pacific ("parent depository institution") under 12 C.F.R. § 204.3(a) ("Computation and maintenance").

This Office recommends that Security Pacific should accordingly consult the FRB concerning the applicability of Regulations D and Q to this matter.

Federal Deposit Insurance

It is a further element of approval of the application that Discount Brokerage comply with all applicable provisions of the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.* Security Pacific states in the application that Discount Brokerage will apply for membership in Securities Investor Protection Corporation ("SIPC") so that customers' cash and securities held by Discount Brokerage will be protected by SIPC insurance coverage, and that cash held by Discount Brokerage will not be insured by the Federal Deposit Insurance Corporation ("FDIC"). As in the matter of the applicability of FRB Regulations D and Q, this Office recommends that Security Pacific consult the FDIC in this regard.

Conclusion

This Office has carefully considered the legality of the activities proposed by Security Pacific for Discount Brokerage. For the reasons presented above, we believe these activities are legally permissible. Based on this legal analysis and our consideration of other relevant information presented by Security Pacific, the application is approved this day.

/s/ Doyle L. Arnold
DOYLE L. ARNOLD
Senior Deputy Comptroller
for Policy and Planning

Dated: 26 August 1982

APPENDIX E

September 20, 1982

Mr. Richard C. Raines
Senior Vice President
Union Planters National Bank of Memphis
67 Madison Avenue
Memphis, Tennessee 38103

Dear Mr. Raines:

The Office of the Comptroller of the Currency has approved the bank's application to acquire Brenner Steed & Associates, Inc., Memphis, Tennessee.

Please advise the Regional Administrator of National Banks in Memphis of the date on which the acquisition of the subsidiary is consummated and furnish its exact address, including street number, and the corporate name.

Very truly yours,

/s/
James E. Brennan
Manager, Bank Structure Analysis
Bank Organization and Structure

bcc: Case
Region 8
Chron: JFA
Chron:JEB
Chron:jj
reader

JFAlmand/jj/September 20, 1982 0880C

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 82-02865
No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, ET AL., APPELLANTS

Civil Action No. 82-02865
84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C.T. CONOVER, COMPTROLLER OF THE CURRENCY,
OFFICE OF THE COMPTROLLER OF THE CURRENCY

Appeals from the United States District Court
for the District of Columbia

[Filed Apr. 12, 1985]

Before: WRIGHT, GINSBURG, and SCALIA, Circuit Judges.

JUDGMENT

These causes came to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: April 12,1985
Opinion Per Curiam.
Opinion concurring in part and dissenting in part filed by Circuit Judge Scalia.

★ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20056